No. 18-1109

In the Supreme Court of the United States

JAMES ERIN MCKINNEY,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

On Writ of Certiorari to the Arizona Supreme Court

BRIEF FOR RESPONDENT

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the Arizona Supreme Court was required to apply current law when weighing mitigating and aggravating findings to determine whether a death sentence is warranted.

2. Whether the correction of error under *Eddings v. Oklahoma*, 455 U.S. 104 (1982), requires resentencing.

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INTRODUCTION

Contrary to the image McKinney paints, the record here offers no reason for the Court to discard its existing path in order to set out sweeping new approaches in two different areas of criminal law, both of which go well beyond the death penalty context. That is especially true given that the imaginative standards McKinney espouses fly in the face of the well-established balance between federal and state courts in these areas as well as the Court's longstanding approach to finality, comity, and the tailoring of post-writ error-correction proceedings.

During sentencing, the judge fully explicated his thoughts, factual conclusions, credibility findings, and legal analysis. He did not restrict McKinney's presentation of mitigating evidence or factual development of mitigating factors. McKinney had a full opportunity to develop his PTSD evidence, including by calling both expert and lay witnesses to address his unfortunate childhood. JA 12–183, 241–258. The judge thereafter made a credibility finding in favor of McKinney's expert. JA 291. The sentencing judge also discussed McKinney's PTSD evidence at length in his special verdict and accepted as true the PTSD diagnosis. Pet. App. 187a–190a.

Unlike the mine-run case, the *Eddings* dispute here was focused on the Arizona Supreme Court's actions instead of those of the trial court. The *Eddings* dispute in the Ninth Circuit turned on whether the Arizona Supreme Court properly considered causal connections in determining whether mitigation evidence in the record should get substantial weight (as opposed to some lesser weight), or instead improperly applied a causal nexus test to give cer-

tain mitigation evidence in the record no weight as a matter of law.

After determining by a 6-5 en banc vote that the Arizona Supreme Court had violated *Eddings*, the Ninth Circuit sent the case down, where the district court entered a conditional habeas order, providing Arizona with an opportunity to "correct the constitutional error in McKinney's death sentence." And the Arizona Supreme Court thereafter initiated post-writ independent-review proceedings that it has repeatedly concluded are not part of state court direct review and do not reopen a conviction when used in this precise procedural posture. *See, e.g.*, *Styers v. Ryan*, 811 F.3d 292, 297 n.5, 298 (9th Cir. 2015) (*Styers VI*), *cert. denied*, 137 S. Ct. 1332 (2017).

McKinney's attempt to expand the retroactive application of *Ring* here founders in the face of the Arizona Supreme Court's determination that the post-writ, *Eddings*-related independent review at issue is a collateral proceeding under state law that does not reopen direct review. The Court's retroactivity standard looks to the contours of state direct review to measure finality in the present context. And the contours of state court direct review is a state-law question that has been answered in the present context by the Arizona Supreme Court. Just as the Court in *Jimenez v. Quarterman*, 555 U.S. 113 (2009), expressly accepted the conclusion of the Texas Court of Criminal Appeals as to whether the case was proceeding on a new direct appeal in state court, the Court must accept the Arizona Supreme Court's conclusion that the proceedings were collateral (not direct), and confirm that *Teague* governs here such that no new rules of criminal procedure apply.

The record here presents a similarly insurmountable roadblock to Petitioner's sweeping request for *all Eddings* errors to be corrected by a trial-level resentencing. Trial-level resentencing might be an appropriate *Eddings* remedy in some cases, but the appropriateness of a per se rule is contradicted by the record and the Arizona procedures presented here. It bears repeating that the supposed *Eddings* error in this case did not stem from the preclusion of mitigation evidence or the failure to create an adequate sentencing record. Instead, the supposed error involved the alleged failure to consider (as a matter of law) extant record evidence of PTSD in the Arizona Supreme Court during de novo appellate review. Considering that history, this is precisely the type of case in which appellate court error correction would be warranted (rather than trial court resentencing).

STATEMENT

A. MURDERS OF MERTENS AND MCCLAIN

In February 1991, McKinney and his half-brother, Charles Hedlund, resolved to commit a string of burglaries. Pet. App. 120a. The men planned their crimes well in advance and vowed to use violence if needed: "McKinney boasted that he would kill anyone who happened to be home … and Hedlund stated that anyone he found would be beaten in the head." *Id.* McKinney and Hedlund learned from friends that Christine Mertens' home would make an attractive burglary target. *Id.* 120a. The brothers attempted to burglarize Mertens' home on February 28, but fled when she arrived home. *Id.* 121a. Hedlund and McKinney selected another home to burglarize that night, but left empty-handed. *Id.*

They burglarized two other homes the following evening. *Id.*

McKinney and Hedlund did not give up on Mertens' home, as they believed she kept a significant amount of money hidden in her refrigerator. *Id.* The men returned to the home on March 9, when Mertens was there alone. *Id.* In keeping with their prior vows of violence, McKinney and Hedlund beat and stabbed Mertens multiple times as she struggled against them. *Id.* McKinney eventually pinned Mertens to the floor, covered his pistol with a pillow to muffle the noise, and shot Mertens in the back of the head. *Id.* McKinney and Hedlund left with only $120. *Id.*

The brothers next targeted the home of 65-year-old Jim McClain. Pet. App. 121a. McClain restored used cars as a hobby, and Hedlund had previously purchased a car from McClain. *Id.* Hedlund believed that McClain kept money in his home. *Id.* 121a–122a. The brothers entered the home through a window as McClain slept; Hedlund was armed with a sawed-off, .22 caliber rifle. *Id.* 122a. After ransacking the house, McKinney and Hedlund went into the bedroom; one of them shot McClain as he slept. *Id.* 122a, 142a–143a. The men took additional valuables from the bedroom and stole McClain's car. *Id.* 122a. A jury found McKinney guilty of two counts of first-degree murder for killing Mertens and McClain. *Id.* 120a.

B. ARIZONA'S SENTENCING FRAMEWORK

Under Arizona law at the time of McKinney's crimes, the trial judge acted as the capital sentencer. Following a guilty verdict for first-degree murder, the judge was to conduct a sentencing hearing to determine the existence of aggravation and mitiga-

tion. *See* A.R.S. § 13-703 (1991).[1] At that hearing, the State was required to prove the existence of aggravation beyond a reasonable doubt, and both a defendant and the State were permitted to introduce any evidence relevant to whether to impose a sentence less than death in support of several statutory mitigating factors and an unlimited, catch-all mitigation category (hereinafter "nonstatutory mitigation"). A.R.S. § 13-703(C), (G) (1991). At the conclusion of the hearing, a judge was to return a special verdict listing the aggravation and mitigation he or she had found, and impose a death sentence upon a finding of at least one aggravating factor and no mitigation sufficiently substantial to call for leniency. A.R.S. § 13-703(D), (E) (1991).

C. SENTENCING

At the sentencing hearing, the court heard testimony from various members of McKinney's family and Dr. Mickey McMahon, a psychologist. JA 12–184, 241–258. McKinney's attorney also submitted a lengthy mitigation memorandum. *Id.* 299–384. McKinney's mitigation centered on his poor childhood, which, Dr. McMahon opined, caused McKinney to develop Post-Traumatic Stress Disorder (PTSD). *Id.* 112–184, 241–258, 330–333. The State presented rebuttal psychological testimony contesting the

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[1] In 2008, the Arizona Legislature reordered and renumbered Arizona's capital sentencing statutes. *See State v. Chappell*, 236 P.3d 1176, 1181 n.3 (Ariz. 2010). Many of the statutes did not change materially from the versions in effect at the time of McKinney's crimes. *See id.* Unless otherwise indicated, Arizona cites the statutes' current versions when they have not changed materially since 1991.

PTSD diagnosis and diagnosing McKinney with Anti-Social Personality Disorder. *Id.* 184–241.

Following the hearing, the sentencing judge found beyond a reasonable doubt that McKinney committed both murders with the expectation of pecuniary gain, *see* A.R.S. § 13-751(F)(3); that McKinney killed Mertens in an especially cruel manner, *see* A.R.S. § 13-751(F)(4); and that McKinney's conviction for killing Mertens constituted a prior conviction for which death or life was possible and thus qualified as an aggravating factor for McClain's murder, *see* A.R.S. § 13-751(F)(1). Pet. App. 178a–187a.

After finding death-qualifying aggravation, the sentencing judge considered the statutory mitigating factors, *see* A.R.S. § 13-751(G)(1)–(5), as well as McKinney's proffered nonstatutory mitigation. Pet. App. 187a–192a. The judge emphasized that he had considered all exhibits admitted into evidence and found, based on testimony from Dr. McMahon and McKinney's family members, that McKinney "had a traumatic childhood" and was raised in "extraordinary" circumstances that were "beyond the comprehension and understanding of most people." *Id.* 187a. The judge found the mitigation witnesses to be truthful, and stated, "I did take them into consideration in this case." *Id.*

With respect to the significant-impairment statutory mitigating factor, the sentencing judge noted the absence of evidence suggesting that McKinney's PTSD significantly impaired his conduct. *Id.* 189a. *See* A.R.S. § 13-751(G)(1) (defendant's capacity to appreciate his conduct's wrongfulness or conform his conduct to the law was significantly impaired, but not sufficiently impaired to constitute a defense to prosecution). The judge highlighted McKinney's

"extensive pre-planning" of the offenses and found no "reason to believe" that PTSD "in any way affected his conduct in this case." Pet. App. 189a–190a. Accordingly, the judge found that McKinney had failed to prove the (G)(1) factor. *Id.* 190a. None of the other statutory mitigating factors were at issue in the case. *Id.* 190a–192a.

Turning to nonstatutory mitigation, the sentencing judge stated that he had reviewed McKinney's mitigation memorandum and reaffirmed his finding that McKinney had a difficult family history. Pet. App. 191a. But he did not "find that [this] is a substantial mitigating factor," repeating his determination that McKinney's history did not impair his ability to understand his conduct and its wrongfulness. *Id.* The judge then left no doubt that he had considered all mitigation, stating: "With respect to the other matters set out in the memorandum, *I have considered them at length*." *Id.* 192a (emphasis added). He explained that "after *considering all of the mitigating circumstances,* [and] *the mitigating evidence* that was presented by the defense in this case as against the aggravating circumstances, and other matters which clearly are not set forth in the statute which should be considered by a court," the mitigation was not sufficiently substantial to warrant leniency. *Id.* 192a (emphasis added).

D. DIRECT APPEAL FRAMEWORK

Direct appeal from a death sentence in Arizona is mandatory and automatic to the Arizona Supreme Court, bypassing the Arizona Court of Appeals. A.R.S. § 13-4033; *State v. Brewer*, 826 P.2d 783, 789–794 (Ariz. 1992). At the time of McKinney's direct appeal, the Arizona Supreme Court independently

reviewed the record to determine whether the death penalty was appropriate. The court for years had conducted this review as part of a self-imposed procedure. *State v. Richmond*, 560 P.2d 41, 51 (Ariz. 1976), *abrogated by State v. Salazar*, 844 P.2d 566 (Ariz. 1992). The court's goal was to further the measured and consistent death-penalty application this Court has required. *See State v. Watson*, 628 P.2d 943, 946 (Ariz. 1981) (citing *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Gregg v. Georgia*, 428 U.S. 153, 189 (1976)).

The Arizona Legislature codified the independent-review procedure in 1994, two years before the direct appeal decision in McKinney's case. *See* A.R.S. § 13-755.[2] The statute requires the Arizona Supreme Court to "independently review the trial court's findings of aggravation and mitigation and the propriety of the death sentence." A.R.S. § 13-755(A). The court reviews the entire record and does not defer to the factfinder. *State v. Roseberry*, 353 P.3d 847, 849–850 (Ariz. 2015). The court independently determines whether the mitigation is sufficiently substantial to warrant leniency in light of the aggravation. A.R.S. § 13-755(B). If it is, then the court reduces the sentence to life. *Id.* If the court harbors doubt about the death penalty's propriety, it errs on the side of a life sentence. *Roseberry*, 353 P.3d at 850.

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[2] Current A.R.S. § 13-755 governs crimes occurring before August 1, 2002; A.R.S. § 13-756 governs crimes that occurred after August 1, 2002. *See State v. Morris*, 160 P.3d 203, 219 (Ariz. 2007).

The Arizona Supreme Court does not consider new evidence on independent review; rather, a defendant must introduce in the trial court all evidence relevant for consideration. *State v. Hedlund*, 431 P.3d 181, 184–185 (Ariz. 2018) (declining, in *Eddings* error-correction independent review, to consider evidence developed in state and federal postconviction proceedings). The court may, however, remand a case to the trial court if evidence has been excluded erroneously or if additional factual development is needed. *See* A.R.S. § 13-755(C).

E. DIRECT APPEAL PROCEEDINGS

The Arizona Supreme Court consolidated McKinney's and Hedlund's direct appeals. *See* Pet. App. 119a. In resolving Hedlund's appeal, the court expressly recognized that a sentencing judge "must consider any aspect of [a defendant's] character or record and any circumstance of the offense relevant to determining whether a sentence less severe than the death penalty is appropriate." *Id.* 141a. The court also observed that "the judge has broad discretion to evaluate expert mental health evidence and to determine the weight and credibility given to it." *Id.* It applied these same principles in independently reviewing McKinney's death sentences. *Id.* 161a–162a.

The court addressed and rejected McKinney's argument that his difficult childhood warranted a life sentence. *Id.* 160a–162a. The court noted that the sentencing judge had "found as a fact that McKinney had an abusive childhood." *Id.* The court further confirmed that "the record shows that the judge gave full consideration to McKinney's childhood and the expert testimony regarding the effects of that child-

hood, specifically the [PTSD] diagnosis." *Id.* 161a. The court highlighted the sentencing judge's assessment that McKinney's PTSD did not explain the offenses, and stated: "a difficult family background, including childhood abuse, does not necessarily have substantial mitigating weight absent a showing that it significantly affected or impacted the defendant's ability to perceive, comprehend, or control his actions." *Id.* And the court ultimately concluded that "[t]he record clearly shows that the judge considered McKinney's abusive childhood and its impact on his behavior and ability to conform his conduct and found it insufficiently mitigating to call for leniency." *Id.* 161a–162a.

F. FEDERAL HABEAS PROCEEDINGS

McKinney alleged, for the first time in his federal habeas petition, that the state courts failed to consider his PTSD mitigation and that they had required McKinney to establish a causal nexus between his mitigation and the offenses, in violation of *Eddings v. Oklahoma*, 455 U.S. 104 (1982), and *Tennard v. Dretke*, 542 U.S. 274 (2004). *See McKinney v. Ryan*, No. 03-cv-00774, 2009 WL 2432738, at *19–*22 (D. Ariz. Aug. 10, 2009).

The district court denied habeas relief. Applying the Anti-terrorism and Effective Death Penalty Act's (AEDPA) standards, the court found it was "clear from the record that the trial court and the Arizona Supreme Court in its independent review of the sentence considered the mitigation evidence presented by Petitioner's witnesses." *Id.* at *22. And the court rejected McKinney's causal-nexus argument, concluding that the state courts had imposed no barriers to considering mitigation and, in fact, had

explicitly considered what McKinney proffered and had "accepted Dr. McMahon's diagnosis of PTSD." *Id.* at *23. "The fact that the courts perceived the lack of a relationship between the mitigating evidence and [McKinney's] criminal conduct and therefore assigned less weight to the evidence than [McKinney] believes was warranted does not constitute a constitutional violation." *Id.*

A three-judge panel of the Ninth Circuit agreed with the district court. *McKinney v. Ryan*, 730 F.3d 903, 914–921 (9th Cir. 2013) (*McKinney III*), *rev'd en banc*, *McKinney v. Ryan*, 813 F.3d 798 (9th Cir. 2015) (*McKinney IV*). The panel found, under AEDPA's standards, that the Arizona Supreme Court in affirming McKinney's sentences had not unreasonably applied *Eddings* and *Lockett v. Ohio*, 438 U.S. 586 (1978). *McKinney III*, 730 F.3d at 914–921. The Ninth Circuit determined that neither the sentencing court nor the Arizona Supreme Court excluded mitigation based on a causal-nexus test or otherwise. *Id.*

The Ninth Circuit, however, heard the case en banc. Pet. App. 12a–118a. By a slim, 6-5 majority, the en banc court disagreed with the three-judge panel and granted habeas relief as to McKinney's death sentences. *Id.* Examining 15 years of Arizona Supreme Court capital-case opinions, the en banc Ninth Circuit concluded that the Arizona Supreme Court had systematically refused to consider non-causally connected mitigation, in violation of *Eddings*, despite the court never having expressly articulated any such refusal. *See id.* 14a–16a, 28a–31a, 36a–46a (collecting cases). In 2004, the en banc Ninth Circuit continued, the Arizona Supreme Court abandoned its unconstitutional test in reaction to

Tennard, and from that point forward permissibly considered the lack of a causal nexus only to assess the appropriate weight of mitigation. *Id.* 46a–47a. Finally, the court concluded that the Arizona Supreme Court had applied its causal-nexus test in McKinney's case, relying on the state supreme court's 1) adoption of the sentencing judge's factual finding that McKinney's PTSD did not affect his conduct, 2) "additional factual conclusion" that McKinney's PTSD should have prompted him not to commit murder, and 3) citation to *State v. Ross*, 886 P.2d 1354, 1363 (Ariz. 1994), in which the causal-nexus test purportedly was articulated. *Id.* 50a–55a. The Ninth Circuit granted conditional habeas relief after finding that the error substantially or materially affected the sentencing verdict under *Brecht v. Abrahamson*, 507 U.S. 519 (1993). Pet. App. 55a–68a.

The five-judge en banc dissenting opinion exposed the majority's flawed reasoning, opining that the majority opinion "wrongly smears the Arizona Supreme Court and calls into question every single death sentence imposed in Arizona between 1989 and 2005 and our cases [in] which [we] have denied habeas relief as to those sentences." *Id.* 73a. The dissent also noted the majority's mischaracterization of the Arizona Supreme Court's independent review of death sentences as "a new sentencing determination," rather than as a review of what the sentencing judge did, and the majority's treatment of "McKinney's trial-court sentencing hearing as irrelevant, except insofar as the Arizona Supreme Court accepted [the judge's] factual findings as its own." *Id.* 83a–85a. The dissent recognized that the Arizona Supreme Court had simply reviewed McKinney's argu-

ment on appeal (that the sentencing judge failed to consider the mitigation evidence), had rejected that argument, and had independently reviewed the sentences. *Id.* 84a–85a. The dissent further concluded that both the sentencing judge and the Arizona Supreme Court had complied with *Eddings*, even under a *de novo* review. *Id.* 82a–113a.

Arizona filed a petition for writ of certiorari, which this Court denied. *See* 137 S. Ct. 39 (2016). Pursuant to the Ninth Circuit's mandate, the district court issued a conditional writ of habeas corpus. That writ read:

> **IT IS ORDERED** that McKinney's Writ of Habeas Corpus is granted unless the State of Arizona, within 120 days from the entry of this Judgment, initiates proceedings either to correct the constitutional error in McKinney's death sentence or to vacate the sentence and impose a lesser sentence consistent with the law.

McKinney v. Ryan, No. 03-cv-00774, Dkt. 84 (D. Ariz. Oct. 6, 2016).

G. POST-WRIT INDEPENDENT REVIEW

To correct the perceived constitutional error and satisfy the conditional writ, Arizona asked the Arizona Supreme Court to conduct a new independent review of the death sentences, without applying the causal-nexus test the Ninth Circuit had identified. JA 385–390. The Arizona Supreme Court granted the motion. *See* Pet. App. 2a.

The Arizona Supreme Court thereafter again examined McKinney's mitigation, making clear that it was invoking the absence of a causal connection only

as a constitutionally permissible weighing mechanism to determine whether to give substantial weight or some lesser amount of weight. *Id.* 4a–9a. The court found the mitigation insufficiently substantial to warrant leniency in light of the weighty aggravating factors for each murder. *Id.* The court therefore affirmed McKinney's death sentences. *Id.* 9a.

SUMMARY OF ARGUMENT

I. Because the Arizona Supreme Court never reopened direct review, and this case was long ago final, *Teague*'s bar on retroactive application of new criminal procedure rules applies here, which means no "current law" needed to be applied in the Arizona Supreme Court and there is no reversible error.

The Arizona Supreme Court's decision as to the collateral nature of the independent review proceedings here is dispositive. A conditional habeas order can never itself reopen state direct review. And the conditional habeas order here was particularly permissive—it offered Arizona the chance to initiate proceedings to "correct the constitutional error," without mentioning mandatory resentencing or new direct review. As such, the Arizona courts were left to decide the proper procedures for correcting the identified constitutional error. And the Arizona Supreme Court turned to proceedings that it has repeatedly concluded are not part of state court direct review and do not reopen a conviction when used in this precise procedural posture.

Irrespective of whether finality for retroactivity purposes is ultimately a federal question, the finality determination here still turns on a dispositive state-law issue: whether the Arizona Supreme Court's

post-writ, *Eddings*-related independent review was a collateral proceeding or part of direct review. The Court's retroactivity standard looks to the contours of state direct review to measure finality in the present context. And the contours of state court direct review is a state law question.

Petitioner overreaches by pointing to the phrase "again capable of modification" in *Jimenez v. Quarterman* as setting the pertinent standard for finality. That phrase in *Jimenez* was accompanied by a crucial modifier: "again capable of modification *through direct appeal*." 555 U.S. at 120 (emphasis added). That is no surprise. Using "again capable of modification" as the test for whether proceedings are direct or collateral in nature, without additional modification or clarification, would deviate from the court's long-standing approach to finality and be wildly over-inclusive.

Indeed, *Jimenez* is entirely consistent with the conclusion that the Arizona Supreme Court determinations end the finality debate. Just as the Court in *Jimenez* expressly accepted the Texas Court of Criminal Appeals' conclusion as to whether that case was proceeding on a new direct appeal in state court, the Court must accept the Arizona Supreme Court's conclusion and confirm that *Teague* governs here such that no new rules of criminal procedure apply.

II. The Court should reject McKinney's sweeping request for mandatory trial-court resentencing for all *Eddings* errors because, as ably demonstrated by the record and prior proceedings here, such a rule is unwarranted and would undermine the interests of justice.

To announce a per se rule requiring trial-level resentencing for all *Eddings* errors would require the Court to disavow prior suggestion that appellate correction in the *Eddings* context was appropriate. And automatic trial-court resentencing would fail to acknowledge the damage to the interests of justice that comes with sending a category of long-ago-final convictions back for resentencing no matter the possibility of remedying any error through a process short of full trial-court proceedings.

A per se rule would be particularly inapt for a case like this one, where there is a particularly robust trial court mitigation record and the Ninth Circuit placed the *Eddings* error squarely at the Arizona Supreme Court. Here, the trial court produced a full explication of thoughts, factual conclusions, credibility findings, and legal analysis, which was more than adequate for post-writ *Eddings* error correction in the Arizona Supreme Court.

Appellate error correction on such a record tracks with existing authority and guidance. In *Clemons*, this Court held that independent appellate reweighing can cure trial-level errors in capital sentencing; that holding even more strongly supports independent appellate reweighing of existing mitigation and aggravation for the same appellate court's errors in capital sentencing. And returning to the locus of the identified error (the Arizona Supreme Court) for error correction echoes the Court's emphasis on efficiently tailoring post-writ remedies in order to place defendants in the same position they would have been in the absence of the identified error.

While McKinney argues that the state courts' purported causal nexus test created a "meaningful risk" that the parties at sentencing tailored their eviden-

tiary presentation toward proving or disproving a causal nexus, the record does not support such a claim. Instead, as the en banc dissent well noted, the record confirms that the Arizona Supreme Court did not categorically exclude mitigation from consideration, meaning that, in the alternative, there is no *Eddings* problem here and no need to remand for a trial-court resentencing.

ARGUMENT

I. BECAUSE THE ARIZONA SUPREME COURT NEVER REOPENED DIRECT REVIEW, NO NEW CRIMINAL PROCEDURE RULES APPLY

This case was long ago final and never reopened, and so it falls within *Teague*'s bar on retroactive application of new criminal procedure rules, which means no "current law" needed to be applied in the Arizona Supreme Court and there is no reversible error. *See Teague v. Lane*, 489 U.S. 288, 310 (1989) ("new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced.").

The conditional habeas order did not reopen direct review as a matter of law or fact—the Arizona courts were left to decide the proper procedures for correcting the identified constitutional error. And Arizona's highest court proceeded with a state-specific appellate procedure that it had already determined is not part of state-court direct review when used in this precise procedural posture. *E.g.*, *State v. Styers*, 254 P.3d 1132, 1134 (Ariz. 2011) (*Styers III)*. This state-law conclusion is dispositive and cannot be overruled because "state courts are the ultimate expositors of

state law." *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975). Therefore, new, post-1996 criminal procedure rules were not applicable in the Arizona Supreme Court's post-conditional-writ proceedings.

A. THE CONDITIONAL HABEAS WRIT HERE DID NOT ITSELF REOPEN DIRECT REVIEW OR REQUIRE THE ARIZONA COURTS TO DO SO

The conditional writ issued here by the district court did not mandate reopening direct review. The order was particularly permissive—it offered Arizona the chance to initiate proceedings to "correct the constitutional error," without mentioning mandatory resentencing or new direct review. *McKinney v. Ryan*, No. 03-cv-00774, Dkt. 84 (D. Ariz. Oct. 6, 2016); *see also* Pet App. 12a–118a. Federal courts, including the Ninth Circuit, readily condition writs on resentencing. *See, e.g.*, *Phillips v. White*, 851 F.3d 567, 583 (6th Cir. 2017) (requiring state to resentence within 90 days or release); *Libberton v. Ryan*, 583 F.3d 1147, 1174 (9th Cir. 2009) (remanding with instructions "to grant the state a reasonable amount of time in which to resentence" petitioner). But that was not done here. And this Court should "not infer … conditions from silence." *Jennings v. Stephens*, 135 S. Ct. 793, 799 (2015); *see also id.* ("Construing every federal grant of habeas corpus as carrying an attendant list of unstated acts (or omissions) that the state court must perform (or not perform) would substantially transform conditional habeas corpus relief from an opportunity 'to replace an invalid judgment with a valid one,' … to a general

grant of supervisory authority over state trial courts.").[3]

Moreover, a conditional habeas order can never itself reopen state direct review. *See Douglas v. Jacquez*, 626 F.3d 501, 504 (9th Cir. 2010) ("a habeas court 'has the power to release' a prisoner, but 'has no other power'"; "'it cannot revise the state court judgment.'"). Federal courts reviewing state convictions have "broad discretion" to "delay the release of a successful habeas petitioner in order to provide the State an opportunity to correct the constitutional violation found by the court." *Hilton v. Braunskill*, 481 U.S. 770, 775 (1987). But this differs from a federal court's review of a federal conviction, which includes "unlimited power to attach conditions to the criminal proceedings on remand." *Henderson v. Frank*, 155 F.3d 159, 168 (3d Cir. 1998). "'Other than granting the writ of habeas corpus and imposing time limits in which the state must either release

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[3] McKinney's citations to resentencing and sentence correction cases (at 16) carry no weight here. *See United States v. Hadden*, 475 F.3d 652 (4th Cir. 2007) (vacating sentence pursuant to language of Section 2255); *State v. Fleming*, 61 So.3d 399, 400 (Fla. 2011) (after defendant initiated state postconviction proceedings, state decided to conduct a full resentencing); *State v. Kilgore*, 216 P.3d 393, 395–396 (Wash. 2009) (state appellate court dismissed two of seven counts while on direct review, requiring the state trial court to correct the judgment and sentence to reflect the reversed counts). None of these cases support the conclusion that an appellate court ushers in "current law" when correcting an appellate error without a resentencing. And, notwithstanding the parade of horribles offered by McKinney and Amici, there is no dispute that vacating and resentencing here would require compliance with "current law."

the petitioner or correct the problem, the precise remedy is generally left to the state.'" *Woodfox v. Cain*, 789 F.3d 565, 569 (5th Cir. 2015).

The limits on federal habeas relief as to state convictions arise from basic tenets of federalism, as well as the contours of the habeas statutes. Unlike 28 U.S.C. § 2255, Section 2254 provides no authority to "vacate and set the judgment aside." The court sitting in a Section 2254 proceeding is guided by the language of Section 2243, which authorizes the court only "to dispose of habeas corpus matters 'as law and justice require.'" *Hilton*, 481 U.S. at 775. And this authority is informed by federalism and "comity among the co-equal sovereigns." *Gentry v. Deuth*, 456 F.3d 687, 692 (6th Cir. 2006); *see also Danforth v. Minnesota*, 552 U.S. 264, 279 (2008). It is perhaps unsurprising then that "[d]istrict courts rightly favor conditional grants, which provide states with an opportunity to cure their constitutional errors." *Gentry*, 456 F.3d at 692.[4]

B. THE ARIZONA SUPREME COURT'S STATE-LAW DETERMINATION THAT POST-CONDITIONAL-WRIT INDEPENDENT REVIEW IS NOT PART OF DIRECT REVIEW ENDS THE RETROACTIVITY ANALYSIS

To address the identified constitutional error, the Arizona Supreme Court turned to proceedings that it has repeatedly concluded are not part of state court direct review and do not reopen a conviction when

[4] Given the special considerations governing Section 2254 cases, McKinney's citations to Section 2255 cases and cases arising solely within the federal courts (at 16, 24, and 27) are particularly uninstructive.

used in this precise procedural posture (independent review following an *Eddings*-based, conditional federal habeas order). *E.g.*, *Styers III*, 254 P.3d at 1134. The Court cannot upend the Arizona Supreme Court's conclusions, which are dispositive as to retroactivity. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 (1992) (this court is bound by the state court's construction of state law).[5]

1. The Arizona Supreme Court Has Held That Its Post-Conditional-Writ Independent Review Proceedings Are Not Part of Direct Review

The Arizona Supreme Court has made two salient state-law conclusions in the precise procedural posture presented here. *First*, A.R.S. § 13-755 permits Arizona Supreme Court independent review in collateral proceedings, not just direct proceedings. *Styers III*, 254 P.3d at 1134 n.1 ("[N]othing in § 13-755 limits our review to direct appeals."); *see also Hedlund*, 431 P.3d at 184–185 (confirming jurisdiction to conduct a second independent review in the post-writ, collateral error-correction context under

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[5] This Court granting review of the Arizona Supreme Court's independent review does not answer whether the Arizona Supreme Court proceedings were direct or collateral in nature. *See Wearry v. Cain*, 136 S. Ct. 1002, 1008 (2016) ("This Court, of course, has jurisdiction over the final judgments of state postconviction courts, see 28 U.S.C. § 1257(a), and exercises that jurisdiction in appropriate circumstances."); *see also Foster v. Chatman*, 136 S. Ct. 1737, 1742–1743 (2016) (certiorari granted from state court habeas proceeding); *Richardson v. Gramley*, 998 F.2d 463, 467 (7th Cir. 1993) ("The fact that events occurring in the state court system after his conviction has become final might entitle him to file *another* petition for certiorari later on does not detract from the finality of his conviction.").

§ 13-755). *Second*, the type of post-writ, *Eddings*-related independent review at issue is a collateral proceeding under state law that does not reopen direct review. *Styers III*, 254 P.3d at 1133–1134 (case was final "[b]ecause Styers had exhausted available appeals, his petition for certiorari had been denied, and the mandate had issued" many years earlier); *see also Hedlund*, 431 P.3d at 184 (reaffirming nature and scope of review under *Styers III*); Pet. App. 1a–9a (citing *Styers III*; determining case was long ago final).

The Arizona Supreme Court first announced these conclusions in *Styers III*, 254 P.3d 1132. There, the court interpreted A.R.S. § 13-755 as permitting a second, collateral independent review by the court after a conditional, *Eddings*-based federal habeas order. *Styers III*, 254 P.3d at 1134 n.1. Given this conclusion, Styers returned to federal habeas after *Styers III*. *Styers v. Ryan*, No. 2:98-cv-02244, 2012 WL 3062799 (D. Ariz. July 26, 2012) (*Styers V*). There, the federal district court denied unconditional habeas relief, accepting the Arizona Supreme Court's conclusion as to the contours of state criminal procedure and explaining that "[i]n light of the court's pronouncement in *Styers III* that a new independent review was authorized under state law, this Court concludes that such review constituted 'an adequate proceeding before an appropriate tribunal.'" *Styers V*, 2012 WL 3062799 at *5. The Ninth Circuit affirmed, noting that the Arizona Supreme Court in *Styers III* had determined not only "whether an independent review under A.R.S. § 13-755 is limited to direct review," but also "that Styers's sentence remained final at the time of the second independent review." *Styers VI*, 811 F.3d at 297 n.5, 298.

The Arizona Supreme Court recently reaffirmed these state-law conclusions in *Hedlund*, 431 P.3d at 184. As Justice Bolick explained in his opinion for the court, after an *Eddings*-related federal habeas order, the Arizona Supreme Court performs a limited, collateral proceeding, which is focused on "correcting the constitutional error identified" by the federal courts and does not reopen direct review or require trial court remand and resentencing. *Id.*[6]

2. The Court Cannot Upend The Arizona Supreme Court's Dispositive Interpretation Of State Law

"This Court … repeatedly has held that state courts are the ultimate expositors of state law." *Mullaney*, 421 U.S. at 691; *see also Johnson v. Fankell*, 520 U.S. 911, 916 (1997) ("Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the State."); *Schad v. Arizona*, 501 U.S. 624, 636 (1991) ("[W]e are not free to substitute our own interpretations of state statutes for those of a State's courts.").

This refusal to second-guess a state supreme court's conclusions as to that state's own law is a "proposition, fundamental to our system of federalism," that applies equally in procedural and substantive contexts. *Johnson*, 520 U.S. at 916; *see also Clemons v. Mississippi*, 494 U.S. 738, 747 (1990) (this Court has no basis to dispute state court's

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[6] A certiorari petition arising out of *Hedlund* is presently pending before the Court. No. 19-5247.

interpretation of state law to decide whether to affirm a death sentence).[7]

The decisions flowing from *Styers III* illustrate the proper federal response to the Arizona Supreme Court's state-law conclusions. *See Styers VI*, 811 F.3d at 297 n.5 ("the question whether an independent review under A.R.S. § 13-755 is limited to direct review is a question of statutory interpretation of an Arizona statute," "determined by Arizona's highest court," which "held that 'nothing in § 13-755 limits our review to direct appeals.'"); *Styers V*, 2012 WL 3062799 at *5 ("In *Styers III*, the Arizona Supreme Court noted that, although independent review is normally conducted in an appeal from a death sentence, 'nothing in § 13-755 limits our review to direct appeals,'" and "[t]his Court is bound to follow the decisions of a state supreme court on state law matters.").[8]

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[7] The extent of a state's power to define the contours of its own direct and collateral review proceedings is illustrated by the state's ability to choose whether to even provide appellate review. *See Jones v. Barnes*, 463 U.S. 745, 751 (1983) ("There is, of course, no constitutional right to an appeal"); *Losh v. Fabian*, 592 F.3d 820, 824 (8th Cir. 2010) ("Federal law imposes no obligation on a state to provide the right to a direct appeal from a judgment of conviction … or the right to collateral review of that judgment once it is final.").

[8] That other state courts might have reached different conclusions as to how their own criminal procedure rules function in different contexts has no bearing on how the Court should approach the pertinent Arizona Supreme Court conclusions here. *See, e.g.*, *Fleming*, 61 So.3d at 404 (discussing retroactivity after state court expressly considered defendant's sentence no longer final); *Kilgore*, 216 P.3d at 397–398 (interpreting state specific appellate rule relating to finality of a decision of a state appellate court). The Arizona Supreme Court's decision is the final word here.

The Eighth Circuit has also demonstrated the proper response in a related context. In *Losh v. Fabian*, the Eighth Circuit faced a retroactivity question that turned on the nature of certain state court appellate procedures, and the court accepted the Minnesota Supreme Court's determination as to whether a particular type of state court criminal procedure was part of direct or collateral review. 592 F.3d at 824. In reaching its conclusion, the Eighth Circuit emphasized the primacy of state courts in determining their own procedures' nature:

> Minnesota's highest court is plainly competent to determine that a type of appellate review under its own law is not direct. That authority is a natural correlate of "the discretion of the state to allow or not to allow such a review" and, when providing a right to direct review, to impose a period of limitation within which that right must be invoked.

Id.; *see also id.* at 825 ("federal courts of appeal, including our own, have decided that state law governs whether a state appellate review procedure is direct or collateral for purposes of [AEDPA's] statute of limitations provision"; gathering cases as to same).

And the First Circuit went even further in *Foxworth v. St. Amand*, 570 F.3d 414 (1st Cir. 2009). There, where the finality of a state conviction was dispositive as to "clearly established federal law," the First Circuit certified to the Massachusetts SJC the question of "the date of finality." *Id.* at 436–437.

3. McKinney Cannot Avoid The Arizona Supreme Court's Conclusions By Saying Finality Here Is Purely A Federal Question

Irrespective of whether finality for retroactivity purposes is ultimately a federal question, the finality determination here still turns on a threshold, dispositive state-law issue: whether the Arizona Supreme Court's post-writ, *Eddings*-related independent review was a collateral proceeding, or part of direct review.

The Court's retroactivity standard looks to the contours of state direct review to measure finality in the present context—as the Court explained in *Caspari v. Bohlen*, "[a] state conviction and sentence become final for purposes of retroactivity analysis *when the availability of direct appeal to the state courts has been exhausted* and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied." 510 U.S. 383, 390 (1994).

And the contours of state court direct review is a state law question, which has been answered in the present context by the Arizona Supreme Court. *See Styers VI*, 811 F.3d at 297 n.5 ("the question whether an independent review under A.R.S. § 13-755 is limited to direct review is a question of statutory interpretation of an Arizona statute," "determined by Arizona's highest court"); *see also Losh*, 592 F.3d at 825 ("federal courts of appeal, including our own, have decided that state law governs whether a state appellate review procedure is direct or collateral for purposes of [AEDPA's] statute of limitations provision").

Gonzalez v. Thaler, 565 U.S. 134 (2012), is not to the contrary. Importantly, the question in *Gonzalez* concerned interpreting finality in the context of Section 2244's limitation period, a context unrelated to the issue now before the Court. *See Clay v. United States*, 537 U.S. 522, 527 (2003) ("the precise meaning [of finality] depends on context."). The Court there made two chief determinations in deciding how to properly measure the limitation period, neither of which answers the choice-of-law question here or undermines the power of the pertinent Arizona Supreme Court decisions. *First*, when a petitioner does not seek available direct review, *Gonzalez* holds that the proper limitation measure is from "the expiration of the time for seeking such review" rather than "conclusion of direct review" (the other available statutory prong). *Gonzalez*, 565 U.S. at 149. *Second*, *Gonzalez* holds that the Court will look to state filing deadlines for measuring expiration of opportunities for further state direct review, and federal deadlines when measuring the time for seeking certiorari. *Id.* at 152.

While the Court in *Gonzalez* refused to look to state-by-state measures of the end of direct review in measuring the Section 2244 limitation period, the Court did so only in the context of choosing the statutory "expiration of time for seeking" review test as the proper measure of the limitation period instead of the "conclusion of direct review" test. *Gonzalez*, 565 U.S. at 151–153. *Gonzalez* does not contemplate what law governs the finality of a state criminal conviction for retroactivity purposes. It also does not reject state-specific determinations as to whether a state proceeding is on direct as opposed to collateral review.

McKinney does no better by pointing to the phrase "again capable of modification" in *Jimenez v. Quarterman*. That phrase in *Jimenez* was accompanied by a crucial modifier: "again capable of modification *through direct appeal*." 555 U.S. at 120 (emphasis added). That is no surprise. Using "again capable of modification" as the test for whether proceedings are direct or collateral in nature, without additional modification or clarification, would deviate from the court's long-standing approach to finality and be wildly over-inclusive. For example, a federal sentence is capable of modification any time a federal court sits in Section 2255 habeas review of a federal conviction. Indeed, any such proceeding can lead to the Court "vacating, setting aside, or correcting" the sentence. 28 U.S.C. § 2255. And yet it is well-accepted that new rules of criminal procedure do not apply generally to either federal habeas proceedings under Section 2255 or state collateral proceedings. *See Teague*, 489 U.S. at 309–310.

Indeed, *Jimenez* is entirely consistent with the conclusion that the Arizona Supreme Court's determinations end the finality debate. *See* 555 U.S. 113 (2009). There, again, the Court considered finality for purposes of Section 2244's one-year limitation period. And the Court reached a "narrow" decision—when a state court grants "an out-of-time direct appeal during state collateral review, but before the defendant has first sought federal habeas relief, his judgment is not yet 'final' for purposes of § 2244(d)(1)(A)." *Id.* at 121. In reaching this conclusion, this Court specifically noted that:

> [W]e have previously held that the possibility that a state court may reopen direct review "does not render convictions and sentences

> that are no longer subject to direct review nonfinal[.]" We do not depart from that rule here; we merely hold that, where a state court has in fact reopened direct review, the conviction is rendered nonfinal for purposes of § 2244(d)(1)(A) during the pendency of the reopened appeal.

Id. at 120 n.4.

The Court in *Jimenez* expressly accepted the Texas Court of Criminal Appeals' conclusion as to whether the case was proceeding on a new direct appeal in state court. Here, where the Arizona Supreme Court has confirmed that the pertinent post-writ proceedings were not part of state-court direct review, the Court must follow the *Jimenez* approach, accept the Arizona Supreme Court's conclusion that the proceedings were collateral (not direct), and confirm that *Teague* governs here such that no new rules of criminal procedure apply.[9]

II. MANDATORY RESENTENCING FOR ALL *EDDINGS* ERRORS IS UNWARRANTED AND WOULD UNDERMINE THE INTERESTS OF JUSTICE, AS DEMONSTRATED BY THE RECORD HERE

McKinney asks for a sweeping statement—that *all Eddings* errors be corrected by a trial-level resentencing, regardless of where in the proceedings the

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[9] McKinney argues that *Hurst* expands *Ring*'s holding (any fact that increases a crime's maximum potential punishment must be found by a jury) to findings of mitigation and its assessment. Pet. Br. 29–33. It is not necessary for the Court to reach this issue to resolve the state-law finality question in Arizona's favor, although Arizona notes its disagreement with this expansive reading of *Hurst*.

error occurred, the nature of the sentencing record on which the supposed error occurred, or the possibility of a harmlessness conclusion.

The Court should reject this sweeping request. Imposing such a per se rule would contradict this Court's suggestion that *Eddings* errors are subject to harmless error review, and otherwise undermine finality and the interests of justice. Moreover, the record here starkly demonstrates why a mandatory rule requiring trial-level resentencing in all *Eddings* cases is unwarranted.

A. A MANDATORY RESENTENCING RULE WOULD CONTRADICT LANGUAGE FROM PRIOR CASES AND UNDERMINE THE INTERESTS OF JUSTICE

To announce a per se rule requiring trial-level resentencing for all *Eddings* errors would require the Court to disavow its prior suggestion that appellate correction in the *Eddings* context was appropriate. In *Hitchcock v. Dugger*, the Court cited the availability of harmless-error review for an *Eddings* violation. 481 U.S. 393, 399 (1987) (sentence adjudged invalid only after Court noted that "Respondent has made no attempt to argue that [the *Eddings*] error was harmless"; "[i]n the absence of such a showing, our cases hold that the exclusion of mitigating evidence of the sort at issue here renders the death sentence invalid"). And the Court has similarly acknowledged the importance of other types of appellate harmlessness review in related contexts. *See, e.g.*, *Calderon v. Coleman*, 525 U.S. 141, 141–147 (1998) (court of appeals erred by failing to apply *Brecht* to claim that jury instruction may have misled jurors into believing they could not consider certain mitigation).

Moreover such a per se rule would constitute a categorical deviation from *Clemons*. *See* 494 U.S. 748–749.

Automatic trial-court resentencing would also fail to acknowledge the damage to the interests of justice that comes with sending a category of long-ago-final convictions back for resentencing no matter the possibility of remedying any constitutional error through a process short of full trial-court proceedings. Not only is unnecessary trial-level resentencing a waste of valuable resources that could be better used providing timely due process for other defendants and victims, but, as Justice Harlan well-explained in a related context, forcing states "to relitigate facts buried in the remote past through presentation of witnesses whose memories of the relevant events often have dimmed" is a poor way to do justice; "This very act of trying stale facts may well, ironically, produce a second trial no more reliable as a matter of getting at the truth than the first." *Mackey v. United States*, 401 U.S. 667, 691 (1971) (Harlan, J., concurring in the judgments in part and dissenting in part).

B. THE RECORD HERE CONTRADICTS THE NEED FOR A MANDATORY RESENTENCING REQUIREMENT

Trial-level resentencing might be an appropriate *Eddings* remedy in some cases (e.g., where the error occurred in the trial court and limited the sentencing record), but the appropriateness of a per se rule is contradicted by the record and the Arizona procedures presented here. It bears repeating that the supposed *Eddings* error in this case did not stem from the preclusion of mitigation evidence or the

failure to create an adequate sentencing record. Instead, the supposed error involved the alleged failure to consider (as a matter of law) extant record evidence of PTSD in the Arizona Supreme Court during de novo appellate review. McKinney bends the history of this case to occlude that the trial court built a robust factual record, including making a finding as to the existence of McKinney's PTSD. Considering that case history, this is precisely the type of case in which trial court resentencing (rather than appellate court error correction) would be unnecessary and likely produce a second hearing no more reliable than the first.

1. The Identified *Eddings* Error Occurred At The Arizona Supreme Court, Not The Trial Court

The *Eddings* dispute here turned on whether, on an established, unchallenged sentencing record, the Arizona Supreme Court (1) improperly applied a causal nexus test and refused to consider certain mitigation *as a matter of law*, or (2) properly considered causal connections in determining whether the mitigation evidence should get substantial weight as opposed to some lesser weight. The key language from the Arizona Supreme Court's opinion—the "causal nexus test" identified by the en banc Ninth Circuit—was as follows:

> a difficult family background, including childhood abuse, *does not necessarily have substantial mitigating weight* absent a showing that it significantly affected or impacted the defendant's ability to perceive, comprehend, or control his actions.

Pet. App. 54a (emphasis added).

In its 6-5 en banc opinion, the Ninth Circuit recognized that it was addressing: "whether *the Arizona Supreme Court* applied its unconstitutional 'causal nexus' test in affirming McKinney's death sentence on *de novo* review." *Id.* 17a; s*ee also id.* 50a–51a (looking only to Arizona Supreme Court's *de novo* sentencing analysis); *id.* 55a (concluding that Arizona Supreme Court's application of causal nexus test was contrary to clearly established federal law).

Indeed, in granting conditional habeas relief, the Ninth Circuit en banc majority did not announce a constitutional error by the sentencing judge. *See id.* 17a ("The precise question before us is whether the Arizona Supreme Court applied its unconstitutional 'causal nexus' test in affirming McKinney's sentence on *de novo* review."); *id.* 51a, 53a–55a (sentencing judge's special verdict as relevant "only to the degree it was adopted or substantially incorporated by the Arizona Supreme Court"); *id.* 84a (Bea, J., dissenting) (criticizing majority for treating sentencing judge's special verdict as generally irrelevant).[10]

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[10] The Ninth Circuit's suggestion that sentencing judges, bound by the Arizona Supreme Court, silently applied that court's alleged causal-nexus test in all cases, Pet. App. 67a–68a, does not rebut the sentencing judge's affirmation here that he considered all mitigation, *see supra* 5–7. Moreover, since the *McKinney* en banc opinion, Ninth Circuit panels have recognized that Arizona courts did not universally apply the alleged causal-nexus test (contra the *McKinney* en banc opinion). *See Ramirez v. Ryan*, 937 F.3d 1230, 1250 (9th Cir. 2019) ("Though the Arizona Supreme Court reviewed Ramirez's convictions in 1994, during the period that the Arizona Supreme Court was applying a causal nexus requirement, the record here indicates that mitigating evidence was not rejected as a matter of law. In fact, the record compels the opposite conclusion."); *Greenway v. Ryan*, 866 F.3d 1094, 1095 (9th Cir. 2017) ("We said in *McKinney* that the Arizona courts had 'consistently' applied the

2. The Record Here Was More Than Adequate For Appellate Error Correction, Which Differentiates This Case From The Court's Trial-Level *Eddings* Remands

Given the record, McKinney's citations to cases where the trial court rejected the defendant's presentation of mitigation are inapposite. *See Hitchcock*, 481 U.S. at 395 (petitioner argued that "additional evidence of mitigating circumstances had been withheld" due to reasonable belief it would not be considered); *Skipper v. South Carolina*, 476 U.S. 1, 3–4 (1986) (trial court excluded witness testimony regarding defendant's good behavior, ruling it inadmissible). Nor is it persuasive to cite cases where faulty jury forms or instructions prevented state courts from grasping what jurors thought of the mitigation presented or the moral implications of the death penalty in light of the facts. *See Penry v. Lynaugh*, 492 U.S. 302, 320 (1989) (jury form prohibited jurors from considering all proffered mitigation evidence); *Mills v. Maryland*, 486 U.S. 367, 385 (1988) (jury form and court instructions may have prevented jurors from considering all mitigation).

The sentencing judge—the actual sentencer under Arizona law at the time—did not restrict McKinney's presentation of mitigating evidence, limit his factual development of mitigating factors, or refuse as a matter of law to consider any mitigation. McKinney had a full opportunity to develop his PTSD evidence: he called Dr. McMahon as an expert witness and several fact witnesses to discuss his unfortunate

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causal-nexus test. 813 F.3d at 803. We did not say, however, that Arizona had always applied it.").

childhood. JA 12–181, 241–258. He also filed a lengthy sentencing memorandum, which the sentencing judge confirmed he had read and which also addressed the PTSD mitigation. *Id.* 299–384; Pet. App. 191a.

The judge thereafter made a credibility finding, concluding that Dr. McMahon had more relevant experience than the State's rebuttal expert and that his opinions were consequently entitled to "more weight" than the State's experts. JA 291. The sentencing judge also discussed McKinney's PTSD evidence at length in his special verdict and accepted the PTSD diagnosis as true. Pet. App. 187a–190a. Indeed, the sentencing judge evaluated McKinney's childhood and resulting PTSD *twice*, as both statutory and nonstatutory mitigation. *Id.* 190a–192a. The judge further affirmed that he had considered *everything* McKinney had proffered. *Id.* 192a ("and after considering all of the mitigating circumstances, the mitigating evidence that was presented by the defense in this case …"); *see also Parker v. Dugger*, 498 U.S. 308, 314 (1991) ("We must assume that the trial judge considered all this evidence before passing sentence. For one thing, he said he did.").

In sum, the trial court produced a full explication of thoughts, factual conclusions, credibility findings, and legal analysis, which was more than adequate for post-writ *Eddings* error correction.

3. Appellate Correction Of Appellate Error Is Supported By *Clemons* As Well As The Need To Tailor Post-Writ Proceedings

In *Clemons*, 494 U.S. at 748, this Court held that independent appellate reweighing can cure trial-level

errors in capital sentencing; that holding even more strongly supports the conclusion that independent appellate reweighing of existing mitigation and aggravation can cure the *same appellate court's* errors in capital sentencing. The Court was clear in *Clemons* that "nothing in appellate weighing or reweighing of the aggravating and mitigating circumstances" is "at odds with contemporary standards of fairness," "inherently unreliable," or "likely to result in arbitrary imposition of the death sentence." *Clemons*, 494 U.S. at 750.

Contrary to McKinney's position, *Clemons* remains good law as to appellate weighing of validly found aggravation and mitigation. And *Clemons*' reasoning applies to the type of legal error being corrected here—where the record is fully formed and the error was failure to consider mitigation in the record, the appellate court is no less capable of properly weighing aggravation and mitigation than when the Court is asked to exclude aggravation. *See, e.g., Goff v. Bagley*, 601 F.3d 445, 479 (6th Cir. 2010) (independent reweighing by Ohio supreme court satisfies *Clemons* and permits appellate cure of trial-court errors in both aggravation and mitigation).

In contrast, given the record, *Caldwell v. Mississippi*, 472 U.S. 320 (1985), cannot carry the weight McKinney places on it. *First*, the holding of *Caldwell* is discrete: "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Id.* at 328–329. The discussion McKinney emphasizes from *Caldwell* is dicta that explains the "reasons to fear substantial unreliability" "when there are state-

induced suggestions that the sentencing jury may shift its sense of responsibility." *Id.* at 320–321. *Second*, the *Caldwell* dicta has no bearing in a case where the record includes a then-valid sentencer making sentencing determinations in the first instance. *Caldwell* explains only how appellate courts "may face certain difficulties in determining sentencing questions in the first instance." *Clemons*, 494 U.S. at 754. And the Arizona Supreme Court was not determining sentencing questions in the first instance here—the court conducted a record-based review that included the trial court's appropriate credibility findings. Pet. App. 3a, 5a–6a. Whatever merit *Caldwell*'s dicta might have in a different *Eddings* context, it has no bearing here in light of the record and procedure before the Court.

Returning to the locus of the identified error (the Arizona Supreme Court) for error correction is also consistent with the Court's emphasis on efficiently tailoring post-writ remedies in order to place defendants in the same position they would have been in absent the prior error. Sixth Amendment habeas remedies are supposed to "be 'tailored to the injury suffered from the constitutional violation,'" while not "'unnecessarily infring[ing] on competing interests.'" *Lafler v. Cooper*, 566 U.S. 156, 170 (2012). The "remedy must 'neutralize the taint' of a constitutional violation, … while at the same time not grant a windfall to the defendant or needlessly squander the considerable resources the State properly invested in the criminal prosecution." *Id.* Applying that approach here supports Arizona Supreme Court correction of its own appellate *Eddings* error and is consistent with the growing expansion of the narrow-tailoring approach beyond the Sixth Amendment

context. *See Lujan v. Garcia*, 734 F.3d 917, 933–934 (9th Cir. 2013) (finding "it sensible that the Court's [Sixth Amendment tailoring] guidance apply equally to a Fifth Amendment remedy, as well"); *Woods v. Ryan*, No. 2:13-cv-02518, 2015 WL 4555251, at *8 (D. Ariz. July 28, 2015) (quoting Sixth Amendment remedy guidance in the context of an Eighth Amendment error); *Styers V*, 2012 WL 3062799 at *3 (same).

C. MCKINNEY'S ATTACK ON THE RECORD IS INSUFFICIENT AND WOULD WARRANT AT MOST A REMAND FOR HARMLESS ERROR ANALYSIS AS TO THE SCOPE OF THE MITIGATION RECORD

McKinney argues (at 43–47) that the state courts' purported causal nexus test created a "meaningful risk" that the parties at sentencing tailored their evidentiary presentation toward proving or disproving a causal nexus. But the record does not support such a claim. Nor does McKinney identify any evidence that counsel failed to present because of a supposed causal-nexus requirement. *Compare* Pet. Br. 44 (alleging that defense counsel and prosecutors "structured their presentation of evidence to address this test"), *with Hitchcock*, 481 U.S. at 395 (petitioner argued that "additional evidence of mitigating circumstances had been withheld" due to reasonable belief it would not be considered). And McKinney in fact argued that his PTSD was mitigating independent of any explanatory relationship, suggesting that he did not tailor his presentation in a way to minimize non-connected mitigation. Pet. App. 69a. Most importantly, the Ninth Circuit found no *Eddings*

error in the trial court and did not issue the writ based on any such error. The Arizona Supreme Court was required to, and did, correct only the alleged error on which the writ was issued.

Further, while the parties highlighted the causal relationship (or lack thereof) between McKinney's PTSD and the two murders he committed, *e.g.*, JA 121–130, that approach remains reasonable in the face of the Ninth Circuit's en banc decision, because a sentencer generally affords significant weight to mitigation that has a causal relationship to—or explains—the crime.

At most, McKinney confirms that, while no evidence was excluded or not submitted in the trial court due to the supposed *Eddings* error, he intends to expand any resentencing to include new material that could never have been offered in the first sentencing proceedings. Pet. Br. 45–47. McKinney contends that the evidentiary portion of his sentencing proceeding should be reopened merely because—as inevitably happens—scientific advances have occurred. *Id.* 46. Yet this does not replace a claim of excluded evidence at the time of the *Eddings* error. And McKinney has offered no explanation for how allowing this ex-post supplementation in light of a historical legal error would not be a windfall. To the contrary, courts have rejected this approach in related contexts. *See Commonwealth v. LeFave*, 714 N.E.2d 805, 813 (Mass. 1999) ("Undoubtedly, recent research has broadened the scientific community's understanding of the effects of suggestive questioning. We are faced, however, with the conflict between the constantly evolving nature of science and the doctrine of finality. In weighing these competing factors along with the interests of justice, we have

concluded that expert testimony may not be considered newly discovered for purposes of a new trial motion simply because recent studies may lend more credibility to expert testimony that was or could have been presented at trial."); *see also State v. Harper*, 823 P.2d 1137, 1143 (Wash. App. 1992) (quotations omitted) ("[T]his strikes us as a classic case: the defendant loses, then hires a new lawyer, who hires a new expert, who examines the same evidence and produces a new opinion. We cannot accept this as a basis for a new trial.").

D. ALTERNATIVELY, THE COURT SHOULD CORRECT THE NINTH CIRCUIT'S CONFLATED READING OF ARIZONA CASE LAW AND CONFIRM THAT THERE WAS NO *EDDINGS* ERROR HERE

The Ninth Circuit granted limited habeas relief because, in its (erroneous) view, the Arizona Supreme Court's language in 1996 represented a causal nexus test that categorically barred (as a matter of law) consideration of mitigating evidence in the court's first independent review. Pet. App. 12a–55a. The Ninth Circuit concluded that, when the Arizona Supreme Court referred to the "weight" of mitigation as measured by its causal nexus to the offense, that constituted treating the pertinent mitigation as irrelevant as a matter of law. *Id.* 53a–55a. The Ninth Circuit's slim en banc majority did this over a vigorous dissent. *See generally id.* 68a–118a. And it did so notwithstanding that the highlighted Arizona Supreme Court language made clear by its own terms that the absence of a causal nexus related only to *weight* for the mitigation (e.g., substantial or

insubstantial) and was not a bar on consideration as a matter of law. *Id.* 54a.

As the en banc dissent well noted, the Arizona Supreme Court did not categorically exclude mitigation by using language that referred to the "weight" of mitigation. The Arizona Supreme Court's language makes clear by its own terms that the causal nexus consideration was being used to determine the appropriate *weight* for the mitigation and not as a bar on consideration as a matter of law. As such, there was never any *Eddings* problem here and there is no need to remand for a trial-court resentencing. The Eighth Amendment requires only that mitigation be considered and does not dictate the weight any particular mitigation should receive—a sentencer must be free to *consider* relevant mitigation, but may determine how much *weight* to give that mitigation in the sentencing calculus. *See Eddings*, 455 U.S. at 114–115 (sentencer may determine weight mitigation deserves); *Harris v. Alabama*, 513 U.S. 504, 512 (1995) ("[T]he Constitution does not require a State to ascribe any specific weight to particular factors, either in aggravation or mitigation, to be considered by the sentencer.").

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the Arizona Supreme Court.

Respectfully submitted.

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